Public Prosecutor v Nuring bte Abdullah

HIGH COURT (SANDAKAN) — CTS NO 47–04 OF 2003
LINTON ALBERT J
2 MARCH 2006

Evidence — Burden of proof — Prosecution's burden — Duty of prosecution to prove charge beyond reasonable doubt — Whether different accounts given by the prosecution witnesses of what happened creates reasonable doubt to prosecution's case — Whether destruction of evidence necessitated by some dubious administrative practice created reasonable doubt to prosecution's case

The accused was charged for trafficking in 282.1g of cannabis on 18 December 2002 at about 10.15pm at an unnumbered house at Sim-Sim Bukit, Jalan Buli, Sim-Sim in the district of Sandakan, Sabah under s 39B(1)(2) of the Dangerous Drugs Act 1952. PW4 (a detective attached to Narcotics Section headed by PW3) gave evidence that he went to the Sim-Sim area a night before the accused was arrested, 17 December 2002 at 7pm and bought two small packets from the accused at her house for RM5 each. PW4 returned to the police station and handed the packets to PW3 (head of the Narcotics Section of the District Police Headquarters) at 9pm. PW4 opened the two packets and was found to contain plant material suspected to be cannabis. These two packets were destroyed later and were not brought before the court. The version given by PW3 when he saw the accused on the day of arrest was also different from that given by PW4.

Held, acquitting and discharging the accused:

(1) Considering the fact that the accused was not more than several feet from the door which was also several feet from the rack, it was highly improbable that the different accounts given by the prosecution of what happened when PW4 and PW5 followed by PW3 and Detective Constable Elizabeth arrived at the house were accurate. The court preferred the version given by the accused that she was pushed inside her house, hence the inference that the alleged conversation between the accused and PW4 could not have been possible (see para 14).

(2) A great disservice was done to the prosecution case by the destruction of the plant material in the two small packets bought by PW4 on the night of 17 December 2002 necessitated by some dubious administrative practice in force in the Narcotic Section at Sandakan, because proof that they constituted cannabis would have been crucial in establishing the nexus between accused and her knowledge and custody or control of the drugs recovered from her house on 18 December 2002 (see para 16).

(3) On the totality of the evidence adduced at the trial, the court was satisfied that the accused had succeeded in raising a reasonable doubt on the prosecution's case (see para 16).

[Bahasa Malaysia summary

Tertuduh telah dituduh mengedar 282.1g kanabis pada 18 Disember 2002 lebih kurang pukul 10.15 malam di sebuah rumah tidak bernombor di Bukit Sim-Sim, Jalan Buli, Sim-Sim dalam daerah Sandakan, Sabah di bawah s 39B(1)(2) Akta Dadah Berbahaya 1952. PW4 (seorang detektif yang bekerja di Bahagian Narkotik diketuai oleh PW3) telah memberikan keterangan bahawa beliau telah pergi ke kawasan Sim-Sim pada waktu malam sehari sebelum tertuduh ditangkap, 17 Disember 2002 pada pukul 7 malam dan membawa dua paket kecil daripada tertuduh ke rumahnya untuk RM5 setiap satu. PW4 telah kembali ke balai polis dan menyerahkan paket-paket tersebut kepada PW3 (ketua Bahagian Narkotik Ibu Pejabat Daerah Polis) pada pukul 9 malam. PW4 telah membuka kedua-dua paket tersebut dan mendapati ia mengandungi bahan tumbuhan disyaki kanabis. Kedua-dua paket tersebut telah dimusnahkan kemudiannya dan tidak dikemukakan di hadapan mahkamah. Versi yang diberikan oleh PW3 apabila beliau melihat tertuduh pada hari tangkapan juga berbeza daripada apa yang diberikan oleh PW4.

Diputuskan, membebaskan dan melepaskan tertuduh:

(1) Dengan mempertimbangkan fakta bahawa tertuduh tidak lebih daripada beberapa kaki daripada pintu yang juga beberapa kaki daripada rak tersebut, adalah besar kemungkinan versi yang berbeza diberikan oleh pihak pendakwa tentang apa yang berlaku apabila PW4 dan PW5 dan diikuti oleh PW3 dan Detektif Konstabel Elizabeth sampai di rumah itu adalah tepat. Mahkamah memilih versi yang diberikan oleh tertuduh bahawa beliau telah ditolak masuk ke dalam rumahnya, justeru itu inferens bahawa perbualan yang dikatakan antara tertuduh dan PW4 tidak mungkinlah berlaku (lihat perenggan 14).

(2) Kerugian telah berlaku kepada kes pihak pendakwa dengan pemusnahan bahan tanaman dalam dua paket kecil yang dibeli oleh PW4 pada malam 17 Disember 2002 dilakukan oleh amalan pentadbiran yang disangsikan di Jabatan Narkotik Sandakan kerana bukti yang ia mengandungi kanabis adalah penting untuk membuktikan pertalian antara tertuduh dan pengetahuan dan milikan atau kawalannya ke atas dadah yang ditemui daripada rumahnya pada 18 Disember 2002 (lihat perenggan 16).

(3) Berdasarkan keseluruhan keterangan yang dikemukakan semasa perbicaraan, mahkamah berpuas hati bahawa tertuduh telah berjaya menimbulkan keraguan munasabah terhadap kes pihak pendakwa (lihat perenggan 16).]

Notes

For cases on prosecution's burden of proof, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 513–524.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301 (refd)
Chan Pean Leon v PP [1956] MLJ 237 at p 242 (refd)
PP v Saimin & Ors [1971] 2 MLJ 16 (folld)
PP v Sainal Abidin Hading [1998] 3 CLJ 41 (folld)
PP v Sim Ah Ba & Anor [1997] 4 MLJ 47

Legislation referred to

Dangerous Drugs Act 1952 ss 37(b), 39B(1)(2)

Norliza Yusof (Gan Peng Kun with her) (Senior Federal Counsels) for the prosecution.
Margaret Hon Yuk Lai (Peter Lo & Co) for the accused.

Linton Albert J:

[1] The accused was charged for trafficking in 282.1g of cannabis on 18 December 2002 at about 10.15pmat an unnumbered house at Sim-Sim Bukit, Jalan Buli, Sim-Sim in the district of Sandakan, Sabah under s 39B(1)(2) of the Dangerous Drugs Act 1952.

[2] ASP Ahmad Kamaruddin bin Abdullah (PW3) the head of the Narcotics Section of the District Police Headquarters, Sandakan, mounted a raid at a house occupied by the accused at the place set out in the charge on the night of 18 December 2002. PW3 had in the preceding two days received confirmation that a woman was engaged in trafficking cannabis from her house in the Sim-Sim, Buli area in Sandakan. This information came from Lance Corporal Rosman bin Abu (PW4), a detective attached to Narcotics Section headed by PW3. On 16 December 2002, PW4 had informed PW3 about the drug trafficking activities and on the instructions of PW3, PW4 went to the Sim-Sim area the following night, 17 December 2002 at 7pm and bought two small packets from the woman at her house for RM5 each PW4 returned to the police station and handed the two packets to PW3 at 9pm. PW4 opened the two packets and were found to contain plant material suspected to be cannabis. PW4 was a member of the raiding party and upon reaching the vicinity of the house he saw a woman standing in front of the door to the house and, together with another member of the raiding party Khairion bin Ahmad (PW5) an Assistant Investigation officer in the same Section, he approached the woman. A brief, friendly conversation ensued between the woman and PW4. The woman started the conversation by asking PW4 what he wanted, to which he replied by asking whether there were drugs and the woman replied in the affirmative. PW4 further testified that when the woman saw PW3 together with one detective Constable Elizabeth approaching towards PW4 and PW5, the woman tried to run inside the house and it appeared to PW4 that she wanted to take something. PW4 and PW5 managed to apprehend that woman and instructed her to sit still but she persisted in attempting to take something from a clothes rack. Eventually, Detective Constable Elizabeth was instructed by PW3 to arrest the woman after which she was asked to sit still while PW3 searched the rack and found a 'cakes almond' tin. The tin was opened in front of the woman and was found to contain 31 small packets containing dried plant material suspected to be cannabis. There was

also a 'Millimewa Superstore' plastic bag inside containing plant material also suspected to be cannabis. PW3 instructed PW4 and PW5 to continue the search inside the house but nothing was found. While PW4 and PW5 were continuing with the search PW3 observed that the woman was always looking at the roof inside the house. PW3 pointed towards the roof where a black plastic bag was tucked into and when opened, after it had been retrieved by PW3, it was found to contain a slab of plant material suspected also to be cannabis. The testimonies of PW3 and PW5 who, together with PW4 gave evidence relating to the raid on 18 December 2002 essentially echoed the testimony of PW4 although there were some discordant notes concerning certain aspects of events and circumstances during the raid.

[3] The accused was arrested and, together with the tin and black plastic bag including their contents, was taken to the police station and subsequently remanded. The plant material found in the tin and black plastic bag were all sent to the Chemistry Department, Kota Kinabalu for analysis. Ahmad Ridzuan bin Ibrahim (PW1) gave evidence on the tests he conducted and explained how he arrived at the conclusion that the plant materials constituted 282.1g of cannabis.

[4] It was contended that on the evidence adduced the prosecution had established its case against the accused as charged. The prosecution relied on circumstantial evidence to prove the essential ingredient of possession of the drugs by the accused. The prosecution contended that the element of knowledge of the drugs could and must be inferred from the surrounding circumstances and the accused's behaviour. Learned DPP relied on the following cases of high authority. In *Wong Nam Loi v Public Prosecutor* [1997] 3 MLJ 795, Shaik Daud JCA delivering the judgment of the Court of Appeal said at p 760:

> Therefore, it seems clear that without knowledge there cannot be possession. In most cases, knowledge cannot be adduced by direct or tangible evidence but only by inference from the surrounding circumstances.

[5] And in *Chan Pean Leon v Public Prosecutor* [1956] MLJ 237 at p 242 Thompson J had this to say:

> Here again knowledge cannot be proved by direct evidence, it can only be proved by inference from the surrounding circumstances. Again the possible variety of circumstances which will support such an inference is infinite. There may be something in the accused's behaviour that shows knowledge, or the nature of the thing may be so obvious that ft is possible to say 'he must have known what it was' or, again in cases under the Dangerous Drugs Ordinance, there may be a statutory presumption which fills a gap in the evidence.

[6] On the concomitant element of custody or control of the drugs, the prosecution invoked s 37(b) of the Dangerous Drugs Act 1952 which states:

> ... a person until the contrary is proved shall be deemed to be the occupier of any premises, if he has, or appears to have the care or management of such premises.

[7] In *Public Prosecutor v Sim Ah Ba & Anor* [1997] 4 MLJ 47 at pp 58–59, Jefferey Tan JC (as he then was) said:

There Is no legal presumption of care or management, and to invoke the presumption under s 37(b), care or management must be proved either by direct evidence or by inference.

[8] It was contended that on the evidence adduced the presumption could properly be invoked and in the circumstances the drugs were found in the house in respect of which the accused was presumed to be the occupier the prosecution had established custody or control of the drugs.

[9] Hence, it was argued that the essential ingredient of possession of the drugs as set out in *Sim Ah Ba* at pp 59–60 had been established:

There is no statutory definition of possession, but it was a word variously said to be enigmatic and vague. However, judicial pronouncements on its meaning include invariably some degree of custody or control, and knowledge of the custody or control.

However 'a man has not possession of that of the existence of which he is unaware', per Cave J in *R v Ashwell* [1885] 16 QBD 190 at p 201. Mere knowledge however is not sufficient to establish possession (see *Gooi Loo Seng v PP* [1993] 2 MLJ 137), but the power of disposal (see *PP v Ang Boo Foo* [1981] 1 MLJ 40) Is no longer an Ingredient needed to support a conviction in a dangerous drugs trial (see *PP v Kau Joo Huat* [1988] 2 MLJ 91).

In *Leow Nghee Um v R* [1956] MLJ 28, Taylor J explained the meaning of custody 'as having care or guardianship...knowledge of the existence and whereabouts of the goods and power of control over them, not amounting to possession', while Ambrose J In *Neo Koon Cheo v R* [1959] MLJ 47 explained that' custody is actual physical control and control must be construed to mean any form of control other than actual physical control'.

[10] In the circumstances, having given the whole evidence adduced by the prosecution my utmost care and consideration and finding the prosecution case not inherently incredible, I held that the prosecution had succeeded in proving a prima facie case in the sense set out in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 at pp 315–316:

A prima facie case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal.

... the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established....

Since the court, In ruling that a prima facie case has been made out, must be satisfied that the evidence adduced can be overthrown only by evidence in rebuttal it follows that if it is not rebutted it must prevail. Thus if the accused elects to remain silent he must be convicted. The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a prima facie case has been made out.

[11] The accused was, therefore, called upon to enter her defence. She chose to give evidence on oath. Her version was this. At about 10pm on 18 December 2002, after she had come back from work at a prawn factory and finished her chores, she was standing in front of her house with the door opened, when the police came and

pushed her into the house and asked her to sit still while the police searched the house. The police found the 'cakes almond' tin on the floor at the corner of the door and the black plastic bag tucked into the zinc roof of the house. When asked by the police about the plant material found inside the tin she told the police that it was tobacco. She told the police she did not know the plant material found inside the black plastic bag when it was shown to her. She testified that when the police raided her house three of her children aged 11, 8 and 3 were in the house, the two younger children were asleep while the eldest was awake. She also said that she had an adopted son called Sabar whom she had brought up but had since returned to live with his biological mother; nevertheless, Sabar still often, came to her house, sometimes looking after the children while she was away at work.

[12] Kinan bin Sulam (DW2) was called by the defence to give evidence. He testified that he had known the accused for about 20 years and confirmed that the accused's three young children were living with her at the relevant time. DW2 also said that Sabar was the accused's adopted son and had seen Sabar occasionally at the accused's house, particularly on at least two occasions when he was taking his bath at a well which was near the accused's house. According to DW2 Sabar was unemployed as he was always seen here and there. So much for the accused's version for the moment. I now turn to the authorities. In *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16 at p 18 Sharma J said:

> A conviction cannot be sustained even if the court is satisfied that the prosecution story 'may be true' unless and until it is found that the prosecution story 'must be true'. The burden of proof remains on the prosecution throughout the trial.
>
> The falsity of the defence does not relieve the prosecution from proving the prosecution case beyond reasonable doubt.

[13] In *Public Prosecutor v Sainal Abidin Hading* [1998] 3 CLJ 41 at p 43, Richard Malanjum J (as he then was) said:

> To secure a convict on the charge preferred the burden of proof remains with the prosecution throughout. The standard of proof required is beyond reasonable doubt. There is no similar burden on the accused. He is presumed Innocent until proven guilty. And in order to avoid a conviction on the charge preferred the accused is only required to introduce a reasonable doubt in the prosecution case. His version may not necessarily be true. But if it succeed in creating a reasonable doubt in the prosecution case, that is sufficient to defeat the charge preferred.

[14] The version given by PW3 when he saw the accused was different from that given by PW4. He said that together with Detective Constable Elizabeth, they were following behind PW4 and PW5 and saw the accused running into the house and being chased by PW4 and PW5 and upon reaching the door of the house PW3 saw the accused attempting to take something from the rack at the corner of the right wall of the house while at the same time PW4 and PW5 managed to prevent the accused from reaching the rack and he then immediately asked Detective Constable Elizabeth to catch and hold on to the accused to prevent her from doing what she had tried to do. PW3 then searched the doorless rack and found the tin containing the drugs on top of some clothing. Later PW3 instructed PW4 and PW5 to search the rest of

the house and while they were searching the house, PW3, Detective Constable Elizabeth and the accused sat on the floor watching PW4 and PW5. PW3 noticed that the accused was taking surreptitious glances at the roof which led him to focus his attention at the roof and then he saw the black plastic bag containing the drugs tucked into the zinc roof. PW5 testified that the accused tried to run into her house when she saw the arrival of PW5 and members of the raiding party. PW5 also saw the accused trying to take something from the rack but PW5 managed to block the accused who then sat on the floor after being instructed to do so. Considering the fact that the accused was not more than several feet from the door which was also several feet from the rack, it was highly improbable that the different accounts given by the prosecution of what happened when PW4 and PW5 followed by PW3 and Detective Constable Elizabeth arrived at the house were accurate. I prefer the version given by the accused that she was pushed inside her house, hence the inference that the alleged conversation between the accused and PW4 could not have been possible. Added to this was the fact that when PW4 saw the accused at the door of the house he had allegedly identified her as the woman from whom he purchased two small packets containing plant material suspected to be cannabis for RM5 each; it is inconceivable that in these circumstances PW4 could have found it necessary to engage in conversation with the accused before pouncing on her. That brings me to the evidence relating to one Idang. According to PW4, he had received information that a woman named Idang had been trafficking drugs from her house at Sim-sim Bukit He said this was conveyed to PW3. It was also part of the prosecution case that the nickname of the accused was Idang. This was at odds with the version given by the defence. The accused denied that her nickname was Idang. DW2 who had known the accused for a long time also testified that the accused's name was Nuring and was certainly unaware that she was also called Idang. The accused testified that a woman called Idang used to come to her house on Sundays and that Idang was a friend of Sabar, her adopted son.

[15] In the cautioned statement (exh D1) the accused had informed the police that the drugs inside the tin belonged to Sabar because her eleven year old child had told her before her arrest that Sabar had come to the house on that day and had put tobacco inside the tin. Other than that the tin had always been used to keep her youngest child's 'Power Rangers' cartoon.

[16] The accused denied knowledge of the black plastic bag found at the roof or the drugs inside it. The prosecution, however, relied on the accused's behaviour in taking surreptitious glances at the roof where the black plastic bag was tucked into which led to the discovery of the black plastic bag and the drugs inside. I find that it was highly improbable that the accused seated as she was in front of the door inside the house with the black plastic bag at the roof about five feet from the door and eight to ten feet high from the floor, could in these circumstances have surreptitiously glanced at the black plastic bag. It was physically impossible for her to achieve that; at best she would have to adjust her head skywards to give the appearance that she was taking glances at the roof. In any event, the black plastic bag was clearly visible thus excluding any possibility that the accused had attempted to conceal it The house was also accessible to all and sundry at any time because the only entrance was a makeshift door without any latch or lock, particularly Sabar and Idang and it was also

possible that what appeared to be men's clothing in the photographs taken in the house which were part of the prosecution evidence could belong to Sabar. For the reasons stated, it is unsafe to infer from the circumstances relied on by the prosecution that the accused had knowledge of the drugs or that she had custody or control of the drugs. A great disservice was done to the prosecution case by the destruction of the plant material in the two small packets bought by PW4 on the night of 17 December 2002 necessitated by some dubious administrative practice in force in the Narcotic Section at Sandakan, because proof that they constituted cannabis would have been crucial in establishing the nexus between accused and her knowledge and custody or control of the drugs recovered from her house on 18 December 2002. On the totality of the evidence adduced at the trial, I am satisfied that the accused had succeeded in raising a reasonable doubt on the prosecution case and I find her not guilty of the charge.

[17] The accused is therefore acquitted and discharged. Order accordingly.

Accused acquitted and discharged.

Reported by K Krishnan